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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA
NATION, a sovereign federally
recognized Indian Tribe,

Plaintiff,

v.

CITY OF TOPPENISH, a
municipality of the State of
Washington,

Defendant.

Case No.: 1:24-cv-03189

PLAINTIFF YAKAMA
NATION'S RESPONSE BRIEF
IN SUPPORT OF MOTION
FOR PRELIMINARY
INJUNCTION

Hearing Date: January 14, 2025
Time: 11:00 am
Location: Yakima Courtroom 324
Judge: Hon. Mary K. Dimke

The Yakama Nation is likely to succeed on the merits because its exercise of civil jurisdiction satisfies the second *Montana* exception and preempts the City's competing assertion of authority, and the City has entirely failed to offer a viable counterargument. The City also does not challenge, and has therefore conceded, that the Yakama Nation will likely suffer irreparable harm absent preliminary relief. The City's only identified equitable or public interest is ensuring that a sprinkler system

1 replace the fire extinguishers stationed in every room of the Yakama Nation's
2 Iniiitnu't Emergency Cold Weather Shelter. This minimal interest pales in
3 comparison to the Yakama Nation's significant interest in protecting its unhoused
4 Yakama Members from serious injury or death as a result of the Yakama
5 Reservation's extreme cold weather conditions.

6 The Yakama Nation has met its burden to secure a preliminary injunction. The
7 Yakama Nation respectfully requests a preliminary injunction that permits the
8 Yakama Nation to continue allowing the Yakima Valley Farmworkers Clinic to host
9 a 24-hour emergency cold weather shelter during the pendency of this lawsuit.

10 I. FACTUAL BACKGROUND

11 Since the Yakama Nation's Iniiitnu't Emergency Cold Weather Shelter
12 ("Shelter") began operating 24-hours per day on November 27, 2024 in the City of
13 Toppenish within the Yakama Reservation, the Shelter has served 179 different
14 individuals. Second Decl. of Jenece Howe in Supp. of Yakama Nation's Response
15 Brief at 2 (January 10, 2025) (hereafter "Second Howe Decl."). On average, 85%
16 of Shelter patrons have been enrolled Yakama Members. Second Howe Decl. at 2.

17 Emergency services have been called to the Shelter on 21 occasions to
18 provide medical assistance to Shelter occupants, to remove patrons that violate
19 Shelter policies, and to treat two drug overdoses within the Shelter. Second Howe
20 Decl. at 2-3. Emergency services also responded to two additional drug overdoses
21 off-site and adjacent to the Shelter. Second Howe Decl. at 3. Yakama Nation
22 Police have been the primary responders to emergency response calls at the
23 Shelter. Second Howe Decl. at 3.

24 Since the Shelter opened, it has provided its occupants with shelter, food,
25 water, community health vaccines, and access to tribal housing, tribal behavioral
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1 health services, People for People transportation services, medicine recovery
2 services, Indian Health Service medical services, and charitable services from
3 Catholic Charities, Sacred Road, and Rod's House. Second Howe Decl. at 2.
4 Several patrons have been enrolled in housing services, drug rehabilitation
5 programs, and received medical care as a result of using the Shelter. Second Howe
6 Decl. at 2. The Shelter has saved unhoused Yakama Members from serious injury
7 or death that they would have otherwise faced due to the Yakama Reservation's
8 extreme cold weather conditions. Second Howe Decl. at 3.

9 II. ARGUMENT

10 A. *Montana's* Exceptions Govern The Scope Of The Yakama Nation's 11 Jurisdiction Over Non-Indians Without Regard For Whether The City 12 Of Toppenish Has Conflicting Jurisdiction.

13 When analyzing whether a federally recognized Indian Tribe has civil
14 regulatory jurisdiction over non-Indians on non-Indian fee land within an Indian
15 Reservation, it is well-established that Courts review the scope of the Tribe's
16 jurisdiction using *Montana* and its exceptions. *United States v. Cooley*, 593 U.S. 345,
17 350 (2021). The City concedes as much by reciting *Montana's* general rule and
18 exceptions at the outset of its Supplemental Response Brief. ECF No. 20 at 2-3.
19 Rather than address *Montana* head on, the City asserts that *Montana* does not apply
20 because the City has deemed the failure to install commercial sprinklers to be a
21 misdemeanor (i.e., criminal) offense. ECF No. 20 at 3. As the City's logic goes, (1)
22 *Montana* only applies to tribal exercises of civil jurisdiction, not criminal
23 jurisdiction, (2) the City assigned a misdemeanor penalty to failing to adhere to its
24 municipal building code governing fire suppression systems, and (3) this case is
25 therefore about criminal jurisdiction, *Montana* does not apply, and the City wins.

1 ECF No. 20 at 3. In other words, the City declares this case to be a dispute about
2 criminal jurisdiction so that it does not have to address *Montana*. The City's logic
3 and resulting arguments fail on multiple accounts.

4 The City assumes without citation to legal authority that its own municipal
5 jurisdiction is relevant here. This case is about the scope of the Yakama Nation's
6 jurisdiction. The relevant inquiry is whether the Yakama Nation can authorize the
7 Yakima Valley Farmworkers Clinic to host the Shelter. The City fails to cite a single
8 case that suggests its own municipal jurisdiction is relevant to whether the Yakama
9 Nation has civil jurisdiction here as a matter of law. *Montana* does not afford the
10 City's municipal jurisdiction any modicum of relevance. *Montana v. United States*,
11 450 U.S. 544 (1981). There is no legal support for the proposition that municipalities
12 located within Indian reservations can deprive tribes of civil regulatory jurisdiction
13 over non-Indians under *Montana* by merely installing a misdemeanor penalty onto
14 a civil municipal ordinance. Giving municipalities such broad power to usurp tribal
15 authority through simple ordinance changes would be unbelievably damaging to
16 tribal sovereignty throughout Indian Country. Non-Indian municipalities across
17 Indian Country could deprive tribes of the ability to protect tribal political integrity,
18 economic security, and health and welfare with a simple vote of the City Council.
19 The City's argument is entirely unsupported by the law, and should be rejected.

20 The City's argument also fails because its building code is not criminal in
21 nature. The City's entire argument turns on its assertion that Toppenish Municipal
22 Code Chapters 1.24 and 15.01, and International Fire Code Section 110.4, are
23 enforceable through criminal penalties, thereby rendering the municipal building
24 code itself to be criminal in nature. ECF No. 20 at 3-5; *but see, e.g., California v.*
25 *Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987) (the fact that an
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1 otherwise civil regulatory law is enforceable by criminal as well as civil means does
2 not convert it into a criminal law). The City offers no citation to precedent supporting
3 its characterization of its municipal building code as criminal. ECF No. 20 at 3-5.
4 To the contrary, the Supreme Court has consistently applied a legal test to determine
5 whether regulations are criminal or civil in a different legal context, and that test
6 strongly suggests that the City's municipal building code is civil. *Cabazon Band of*
7 *Mission Indians*, 480 U.S. at 209-10.

8 In *Ysleta del sur Pueblo v. Texas*, 596 U.S. 685 (2022), the Supreme Court
9 considered whether state bingo regulations were civil or criminal in nature, which
10 they determined by analyzing whether the state outright prohibited all forms of bingo
11 making the regulations criminal, or whether the state allowed at least some forms of
12 bingo under heavy regulations making those regulations civil. *Ysleta del sur Pueblo*,
13 596 U.S. at 700. Because the State allowed but heavily regulated bingo, the
14 regulations were deemed civil in nature. *Id.* at 700-01. Here, the City does not
15 prohibit access to, or use of buildings without fire suppression systems (as
16 previously stated, the City has in fact permitted overnight shelter use in the exact
17 structure at issue) so the municipal building code cannot be criminal in nature. ECF
18 No. 13 at 26. By allowing certain fire suppression systems in certain contexts, the
19 regulations are civil in nature. ECF No. 13 at 26. Even if we accept the City's flawed
20 logic that the nature of its jurisdiction bears any relevance to this case, the municipal
21 code provisions that it raises are civil; not criminal. *Montana* applies to this case.

22 Even if the City's municipal building code were criminal in nature, the
23 Supreme Court has demonstrated that a third party government's criminal
24 jurisdiction related in some way to the non-Indian conduct at issue in a *Montana*
25 analysis has no impact on the applicability of *Montana* or the outcome of that
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1 analysis. In *United States v. Cooley*, the Supreme Court applied *Montana* to
2 determine whether the Crow Tribe properly exercised civil regulatory authority to
3 stop and search a non-Indian on a state highway who was threatening public safety
4 by carrying assault weapons and methamphetamines in his vehicle. *Cooley*, 593 U.S.
5 at 350-51. The State and Federal Government had jurisdictional interests in the
6 criminal conduct of the non-Indian at issue in that case—and in fact the case arose
7 from the federal criminal prosecution of the non-Indian—but that did not dissuade
8 the Supreme Court from applying *Montana* to determine whether the exercise of
9 Tribal government authority through a stop and search of the non-Indian Defendant
10 was a valid exercise of civil regulatory jurisdiction. *Id.* The existence of a third party
11 government’s criminal jurisdiction over the non-Indian conduct that was subject to
12 the Tribe’s civil regulatory authority had no bearing on whether the *Montana*
13 analysis applied. Extending that reasoning here, even if the City’s municipal building
14 code were criminal in nature, that is not relevant to whether the Yakama Nation has
15 civil regulatory authority to authorize the Yakima Valley Farmworkers Clinic to host
16 a 24-hour emergency cold weather shelter under *Montana*.

17 The City offers no meaningful challenge to the Yakama Nation’s motion under
18 *Montana*. The City’s Supplemental Response Brief only cited two cases that applied
19 *Montana*, with no discussion of either case: *Plains Commerce Bank v. Long Family*
20 *Land & Cattle Co.*, 554 U.S. 316 (2008), and *Atkinson Trading Co. v. Shirley*, 532
21 U.S. 645 (2001). Both cases are plainly distinguishable from this dispute under the
22 second *Montana* exception because the Yakama Nation has a significant sovereign
23 interest here in protecting the health and safety of its Members and the Tribe, which
24 was not present in the City’s two cited cases. *Plains Commerce Bank* considered and
25 rejected a tribal court’s jurisdiction over the sale of non-Indian fee land between two
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1 non-Indian entities. *Plains Commerce Bank*, 554 U.S. at 320. *Atkinson Trading Co.*
2 addressed whether a Tribe can impose a hotel occupancy tax on a business
3 transaction between non-Indian hotel customers and a non-Indian hotel on non-
4 Indian fee land within a Reservation. *Atkinson Trading Co.*, 532 U.S. at 647-49. In
5 both cases, the Supreme Court found the Tribe's sovereign interests to be lacking in
6 business transactions solely between non-Indians on non-Indian fee lands.

7 In contrast, in this case the Yakama Nation is regulating an interaction between
8 non-Indians (Yakima Valley Farmworkers Clinic) and Indians (the Yakama Nation
9 and its unhoused Yakama Members), and unhoused Yakama Members' lives are at
10 stake. That brings this case much closer to the facts of *Cooley*, *Brendale*, *FMC Corp.*,
11 *Rincon Mushroom Corp. of Am.*, *Glacier Elect. Coop.*, and *Alden Big Man*, all of
12 which recognized tribal civil jurisdiction over non-Indian conduct that threatened or
13 had a direct impact on a Tribe and its enrolled members. *Cooley*, 593 U.S. 345;
14 *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408
15 (1989) (addressing *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735 (E.D. Wash.
16 1985) (hereafter "*Whiteside I*"); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d
17 916 (9th Cir. 2019); *Rincon Mushroom Corp. of Am. v. Mazzetti*, 2024 U.S. App.
18 LEXIS 14952 (9th Cir. 2024) (unpublished); *Big Horn County Elect. Coop. v. Alden*
19 *Big Man*, 526 F. Supp. 3d 756 (D. Mont. 2020); *Glacier Elect. Coop., Inc. v. Gervais*,
20 2015 U.S. Dist. LEXIS 193816 (D. Mont. 2015). The Yakama Nation satisfies the
21 second *Montana* exception here, and the City's Response Brief does not argue
22 otherwise.

23 As a side note, the Yakama Nation likely has civil jurisdiction under the first
24 *Montana* exception as well. The first *Montana* exception recognizes tribal civil
25 authority where a non-Indian entered into a consensual commercial relationship with
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1 a Tribe or its Members. *Cooley*, 593 U.S. at 350. The Yakama Nation entered into a
2 lease with the Yakima Valley Farmworkers Clinic that is governed by applicable
3 Yakama Nation laws, and which secures the Yakama Nation’s ability to operate the
4 Shelter out of the Clinic’s facility. Second Howe Decl. at 3. The Yakima Valley
5 Farmworkers Clinic has therefore entered a consensual commercial relationship with
6 the Yakama Nation, satisfying the first *Montana* exception. Under either *Montana*
7 exception, the Yakama Nation possesses civil regulatory authority here.

8 **B. The City Ordinance On Sprinkler Systems Conflicts With The Yakama**
9 **Nation’s Exercise Of Civil Jurisdiction And Is Preempted.**

10 The City’s authority over non-Indian activities within city limits is “limited
11 by the twin barriers of ‘infringement on tribal sovereignty’ and ‘federal
12 preemption.’” *Whiteside I*, 617 F. Supp. at 745-46. “When used in the context of
13 Indian law, the doctrine of preemption is uniquely applied.” *Whiteside I*, 617 F.
14 Supp. at 746. “[A] preemption analysis rests principally on a consideration and
15 balancing of the competing federal, [state] and tribal interests at stake.” *Id.* When
16 considering the interests of the federal government and tribes:

17 Federal and tribal interests are assessed from a broad perspective.
18 Traditional notions of Indian sovereignty and the federal
19 government’s commitment to the promotion and protection of
20 tribal resources and cultural values are considerations which
21 must be weighed on the preemption scales.

22 *Id.* In contrast, consideration of the City’s interest “is guided by more narrow and
23 specific considerations[,]” and concepts of state/county/municipal sovereignty and
24 general municipal governmental interests “are of limited importance.” *Id.* The
25 City’s interest would be substantial if it could “point to off-reservation effects that
26 necessitate state [] intervention.” *Id.*

Applying this federal preemption test, the United States and Yakama Nation's interests far outweigh the City's interests, so the City's municipal building code is preempted. The United States has a federal trust obligation to promote, protect, and defend the Yakama Nation's right to self-determination, and the Yakama Nation's interest in protecting its enrolled Yakama Members strikes at the very heart of the Yakama Nation's continued political existence. In contrast, the City's only stated governmental interest is in having fire sprinklers instead of fire extinguishers in the Shelter. Not that there should be a fire suppression system in the first place, because the Yakama Nation has fire extinguishers stationed throughout the Shelter, but rather which fire suppression system is preferable. The City does not point to a single off-reservation impact from the Yakama Nation's exercise of jurisdiction here. The United States' and Yakama Nation's interests far outweigh the City's interests, so the relevant provisions of the City's municipal building code are preempted as a matter of law.

C. The City Has Not Meaningfully Challenged The Yakama Nation On The Irreparable Harm, Balancing of Equities, And Public Interest Elements Of The Preliminary Injunction Standard.

The City has not refuted, in briefing or at oral argument, the Yakama Nation's assertion that it will face irreparable harm absent preliminary relief in the form of the significant injury or death of unhoused Yakama Members. ECF No. 4 at 12-13. The City's silence should be treated as a concession of the second element of the preliminary injunction standard. *Intellicheck Mobilisa v. Wizz Sys., LLC*, 173 F. Supp. 3d 1085, 1108 (W.D. Wash. 2016) (citing *United States v. Great Am. Ins. Co. of NY*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) for the proposition that "[i]t is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived.") The City expressly conceded during

1 the December 18, 2024 hearing that its only interest in this case is the difference in
2 fire safety between a sprinkler system on the one hand, and fire extinguishers
3 stationed in every room of the Shelter on the other hand. However, that interest is
4 entirely undermined by the fact that the City permitted a non-Indian organization
5 to operate a 24-hour shelter in the same building from 2020-2022 without the fire
6 sprinkler system that the City requires today. ECF No. 13 at 4-5. The City's
7 explanation for this differential treatment between a non-Indian organization and
8 an Indian Tribe is that state law changed in 2020 to allow the City to enforce its
9 sprinkler system requirements on homeless shelters.¹ ECF No. 20-1 at 2-3. But, the
10 non-Indian organization operated in the same building without a sprinkler system,
11 and with the City's approval, from 2020-2022 (i.e., after the law was changed). In
12 other words, the City's identified state laws have not changed between the non-
13 Indian organization's operation of the shelter, and the Yakama Nation's operation

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15 ¹ The City argued during the December 18, 2024 hearing that RCW 35A.21.360(7)
16 allows the City to enforce Toppenish Municipal Code ("TMC") Chapter 15.01's
17 sprinkler requirements against the Shelter. This state law argument has no bearing
18 on the federal issues raised. Even if it were relevant, RCW 35A.21.360(7) only
19 allows a code city to avoid RCW 35A.21.360(2)'s restrictions if the relevant code
20 provisions were enacted prior to June 11, 2020. RCW 35A.21.360(7)(a)(i). The
21 City repealed and replaced TMC Chapter 15.01 in its entirety pursuant to City
22 Council Ordinance 2020-10 on September 14, 2020 (i.e., after June 11, 2020).
23 Second Decl. of Ethan Jones in Supp. of Plaintiff Yakama Nation's Response Brief
24 Ex. A, at 2 (January 10, 2025). Because TMC Chapter 15.01 was enacted *after*
25 June 11, 2020, RCW 35A.21.360(7) does not apply and RCW 35A.21.360(2)
26 restricts the City's ability to enforce TMC Chapter 15.01 here.

1 of the shelter. It is therefore unclear why the City allowed non-Indians to operate
2 the shelter, but will not allow Indians to operate the shelter.

3 In contrast, the Yakama Nation has a significant interest in saving its
4 enrolled Yakama Members from serious injury or death as a result of the Yakama
5 Reservation's cold weather conditions. By extension, the Yakama Nation has a
6 significant interest in protecting its own political integrity, health, and welfare. As
7 previously briefed, every enrolled Yakama Member carries the unwritten laws,
8 teachings, ceremonies, language, and songs of their ancestors, which they pass on
9 to their children just as their elders passed on the Yakama culture to them. ECF
10 No. 15 at 5. These are fundamental to the Yakama Nation's identity and
11 sovereignty. There is no Yakama Nation without Yakama Members, which makes
12 every Yakama Member critically important to the Yakama Nation's continued
13 existence. These interests tip the equitable balance strongly in the Yakama
14 Nation's favor, and the public interest is served by protecting unhoused Yakama
15 Members and supporting the Yakama Nation's sovereign interests.

16 IV. CONCLUSION

17 The Yakama Nation requests that the Court grant its motion for a preliminary
18 injunction, enjoining the City of Toppenish, and all persons acting on the City's
19 behalf, from exercising civil jurisdiction to prevent the Yakama Nation from
20 authorizing the Yakima Valley Farmworkers Clinic to host a 24-hour emergency cold
21 weather shelter on non-Indian fee land within the Yakama Reservation.

22 Respectfully submitted this 10th day of January, 2025.

23 

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